



4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Part 75 and Chapter III

Final Waiver and Extension of the Project Periods for the American Indian Vocational Rehabilitation Services Program

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Final waiver and extension of project periods.

SUMMARY: The U.S. Department of Education (Department) waives the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The waiver and extension enable 29 American Indian Vocational Rehabilitation Services (AIVRS) projects under Catalog of Federal Domestic Assistance (CFDA) number 84.250K to receive funding for an additional period, not beyond September 30, 2021.

DATES: The waiver and extension of the project periods are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: August Martin, U.S. Department of Education, 400 Maryland Avenue, SW, room

5064A, Potomac Center Plaza, Washington, DC 20202-1800.

Telephone: 202-245-7410. Email: August.Martin@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background:

Under section 121(a) of the Rehabilitation Act of 1973, as amended (the Act), the purpose of the AIVRS program is to provide grants to the governing bodies of Indian Tribes located on Federal and State reservations (and consortia of such governing bodies) to pay 90 percent of the costs of vocational rehabilitation (VR) services, including culturally appropriate services, to American Indians with disabilities who reside on or near Federal or State reservations, consistent with each eligible individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that each individual may prepare for, and engage in, high-quality employment that will increase opportunities for economic self-sufficiency.

In fiscal year (FY) 2015, the Department published in the *Federal Register* (80 FR 18606) a notice inviting applications (NIA) announcing the grant competition for the

AIVRS program under CFDA 84.250K. The Department funded 29 applications for a 60-month period that will expire as of September 30, 2020. Any AIVRS grantee seeking a new five-year grant award would typically apply and compete in a new grant competition during their fifth and final year of funding.

On March 9, 2020, the Department published in the *Federal Register* (85 FR 13636) an NIA for the FY 2020 AIVRS competition, CFDA 84.250N (2020 NIA). Any new Tribes seeking an AIVRS grant along with the grantees whose grants are expiring on September 30, 2020 would need to submit an application in response to the FY 2020 NIA in order to receive an award that would start on October 1, 2020.

At roughly the same time as the Department published the FY 2020 NIA, in early spring 2020, the effects of the COVID-19 pandemic began to be felt in the United States. American Indian reservations experienced and continue to experience high rates of COVID-19 infections. Many of the entities eligible for AIVRS grants across the country took actions to limit the spread of COVID-19 by requiring their non-essential personnel to shelter at home. We have been informed that many AIVRS personnel who continue to shelter-in-place at home to avoid exposure to COVID-19 have limited access to the necessary technology to telework, such as

personal computers, Wi-Fi, or internet availability to connect to workplace servers or workplace resources, and we assume that would also be true of personnel who do not currently receive a grant but would be eligible to apply. This limits their ability to access the information needed to prepare a quality application for the FY 2020 AIVRS competition. In addition, we have been notified that some of the programs attempting to develop grant applications have had difficulty acquiring the Tribal resolutions needed to submit an application for Federal funding or working with the Tribes' administration, including the authorized representatives needed to approve, sign, and submit applications in Grants.gov.

On May 20, 2020, the Department published a notice in the *Federal Register* (85 FR 30690) extending the application deadline for the AIVRS program competition (84.250N) to June 26, 2020. However, given the ongoing and, for some Tribes, escalating cases of COVID-19 and the continuing challenges resulting from the pandemic, the situation for the Tribes has not improved, and the 30-day extension has not been sufficient to address these circumstances.

Therefore, in a notice published elsewhere in this issue of the *Federal Register*, the Department is

withdrawing the FY 2020 NIA and cancelling the FY 2020 CFDA 84.250N competition. At the same time here, under its authority to make certain AIVRS grants effective for more than 60 months under section 121(b)(3) of the Act, the Department is waiving the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, and extending the project period, as well as waiving the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. The waivers and extension will enable the Department to provide additional funds to 29 projects under CFDA 84.250K for an additional period, not beyond September 30, 2021.

This action allows the 29 AIVRS grantees to submit a request for continuation funding in FY 2020 based on their prior fiscal year's continuation award and certification from each grantee that they have the capacity to continue activities and wish to continue to receive additional funds. However, decisions regarding each grantee's annual continuation award will be based on the program narrative, budget, budget narrative, and prior program performance report submitted by each of these 29 AIVRS grantees and on the requirements of 34 CFR 75.253. Any activities to be

carried out during the year of continuation award would have to be consistent with, or be a logical extension of, the scope, goals, and objectives of each grantee's application as approved following the 2015 AIVRS competition. The FY 2015 AIVRS NIA will continue to govern each grantee's project during the extension year. These current AIVRS grantees may contact their RSA project officer regarding their request for a continuation award in FY 2020 for a project period through FY 2021.

Final Waivers and Extensions:

For these reasons, the Department does not believe that it is in the public interest to run a new competition for the AIVRS program, CFDA 84.250N, in FY 2020. Given the challenges in Indian country due to the COVID-19 pandemic, extending the end dates of the 29 AIVRS projects currently in their fifth year will allow for more efficient use of the funding and avoid any interruption in services that might result from waiting one year to hold a competition for new five-year AIVRS grant projects in FY 2021. Through that competition the Department intends to make funds available for all eligible applicants, including the 29 AIVRS grantees funded in FY 2015 and the 13 AIVRS grantees funded in FY 2016, whose grants will be expiring on September 30, 2021.

For these reasons, the Department waives the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. This waiver allows the Department to issue a one-time FY 2020 continuation award to each of the 29 AIVRS projects currently funded under CFDA 84.250K estimated as follows:

Grantee Name	Amount
Confederated Tribes and Bands of the Yakama Nation	\$453,200
Lower Muskogee Creek Nation	\$405,200
The Cherokee Nation	\$605,000
Confederated Tribes of the Colville Reservation	\$464,144
Samish Indian Nation	\$310,206
Inupiat Community of the Arctic Slope	\$505,778
Confederated Tribes of the Umatilla Indian Reservation	\$392,956
Prairie Band of Potawatomi Nation	\$300,000
Hopi Tribe	\$484,469
Hannahville Indian Community	\$397,270

Kawerak, Inc.	\$424,496
Saint Regis Mohawk Tribe	\$406,000
Confederated Salish and Kootenai Tribes	\$521,000
Chippewa Cree Tribe of the Rocky Boy Reservation	\$412,000
The Coeur D'alene Tribe	\$444,109
Confederated Tribes of Siletz Indians	\$384,442
Cook Inlet Tribal Council, Inc.	\$628,858
Stillaguamish Tribe of Indians of Washington	\$575,947
Moapa Band Paiute	\$365,000
Association of Village Council Presidents, Inc.	\$473,104
Cheyenne River Sioux Tribe	\$384,587
United Houma Nation, Inc.	\$499,086
Laguna Department of Education	\$450,000
Northern Cheyenne Tribe	\$375,000
Eastern Shoshone Tribe	\$490,368
Tohono O'odham Nation	\$450,723
Standing Rock Sioux Tribe	\$521,823
Central Council of Tlingit and Haida Indian Tribes of Alaska	\$556,369
Lower Elwha Tribal Community	\$323,430

Waiver of Notice and Comment Rulemaking and Delayed
Effective Date under the Administrative Procedure Act

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice and comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B)).

Generally, the "good cause" exception to notice and comment rulemaking under the APA, see 5 U.S.C. 553(b)(3)(B), is to be "narrowly construed and only reluctantly countenanced." *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). The exception excuses notice and comment in emergency situations, *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981), or where delay could result in serious harm. See *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir.1995).

The COVID-19 pandemic struck during the second half of Federal FY 2020 and, as explained earlier, created a situation where the Tribes were dealing with such

overwhelmingly trying circumstances that the Department determined that, with their resources and attention diverted to addressing concerns created by the pandemic, it would be too difficult for them to submit applications for the AIVRS grants scheduled to be awarded this year in a timely manner. For this reason, it became necessary for the Department to extend the grants awarded under CFDA 84.250K for an additional year. There is insufficient time left in FY 2020 to adopt these waivers and extensions of the project periods through notice and comment rulemaking and to make the continuation awards to the 29 expiring AIVRS grants. Failure to extend the existing AIVRS grants under CFDA 84.250K for an additional year would result in an interruption of essential services to the American Indians with disabilities who rely on them. In addition, the Department is unique among Federal agencies in that it must go through notice and comment rulemaking under the APA to make its grants. The exception in the APA exempting grants from notice and comment generally does not apply to the Department. 5 U.S.C. 553(a)(2); 20 U.S.C. 1232(d). In short, in the unusual circumstances here, notice and comment rulemaking is both impracticable and not in the public interest.

The APA also requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). Given that it is not possible to run an effective AIVRS competition this year, it is crucial that the funded grantees under CFDA 84.250K continue to provide services through all of FY 2021. A delayed effective date would be contrary to public interest by prolonging uncertainty about the continuation of VR services provided to American Indians with disabilities living on or near a reservation. Therefore, the Department waives the delayed effective date provision for good cause.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment rulemaking under 5 U.S.C. 553.

Paperwork Reduction Act of 1995

This waiver and extension of the project periods does not contain any information collection requirements.

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g.,

braille, large print, audiotape, or compact disc) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site. You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,
*Commissioner, Rehabilitation
Services Administration,
Delegated the authority to perform
the functions and duties of the
Assistant Secretary for the Office
of Special Education and
Rehabilitative Services.*